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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1438

ASSOCIATED ELECTRIC COOPERATIVE, INC., PETITIONER

v.

STANLEY K. HATHAWAY, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 507 F.2d 1167. The order of the district court (Pet. App. 23a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1974. A petition for rehearing was denied on December 16, 1974 (Pet. App. 22a). On March 12, 1975, the Chief Justice granted an extension of time for filing a petition for a writ of certiorari to and including May 15, 1975, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a 1962 contract, under which the Southwestern Power Administration (SPA) agreed to reduce its charges for the electric power it supplied to petitioner by crediting petitioner's account for the value of certain services petitioner was to perform for SPA, barred the Secretary of the Interior from instituting a new charge to cover the cost SPA incurred in transmitting the power to petitioner.

2. Whether Congress, by appropriating funds to implement the contract between SPA and petitioner, in effect repealed the provision of the Flood Control Act, 16 U.S.C. 825s, that requires SPA to recover the cost of transmitting electric power.

3. Whether the actions of the Secretary of the Interior in proposing the rate revision, and of the Federal Power Commission in denying petitioner's petition to intervene and request for a hearing, were arbitrary, capricious, or an abuse of discretion.

STATUTES INVOLVED

Section 5 of the Flood Control Act, 58 Stat. 890, 16 U.S.C. 825s, and the pertinent provision of the Department of Interior Appropriation Act, 1950, 63 Stat. 767, as amended, 16 U.S.C. 825s-1, are set forth at Pet. 3-5.

STATEMENT

Section 5 of the Flood Control Act of 1944, 58 Stat. 890, 16 U.S.C. 825s, provides that hydroelectric power produced at certain dams owned and operated by the United States is to be delivered to the Secretary of the Interior for disposal "at the lowest possible rates to consumers consistent with sound business principles, * * * having regard to the recovery * * * of the cost of producing and

transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years."[1] The Act further provides that the Secretary is authorized to construct or acquire only such transmission facilities as may be necessary to make the hydroelectric power "available in wholesale quantities for sale on fair and reasonable terms" to facilities owned by others. Rate schedules established by the Secretary become effective upon approval by the Federal Power Commission. *Ibid.*

Following enactment of the Flood Control Act, the Secretary designated the Southwestern Power Administration (SPA) as a marketing agent for federal hydroelectric power (10 Fed. Reg. 14527; Pet. App. 4a). Initially, SPA proposed to construct an extensive transmission system, but this proposal was rejected by Congress in 1946. 92 Cong. Rec. 7186-7200 (1946). Accordingly, between 1949 and 1951 SPA contracted with private generation and transmission cooperatives to lease certain of their transmission facilities, to be constructed with funds borrowed from the Rural Electrification Administration, and to pay all costs of operation, maintenance, repair, and capital replacement, as well as amortization payments on the construction loans. SPA also agreed to purchase the entire output of certain of their steam plants, also to be constructed with Rural Electrification Administration funds,

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[1]Both the Secretary and the Federal Power Commission have interpreted the term "amortization" in the statutes as including interest, and have adopted the policy that 50 years is a "reasonable period of years" within the meaning of the statute.

and then to resell to the cooperatives whatever power they required (Pet. App. 4a-5a).[2]

Until 1954, Congress appropriated funds to meet these contractual obligations. The contracts were suspended during fiscal years 1954 and 1955 when Congress withheld appropriations pending the outcome of litigation concerning the Secretary's authority to enter into such contracts. In 1956 Congress resumed appropriations for the lease contracts. At that time the House Committee on Appropriations instructed the Secretary that the contracts should be amended to provide that the charges for the power sold to the cooperatives would be reduced by credits relating to SPA's use of the cooperatives' transmission and generation facilities and that the power would be delivered to the cooperatives' load centers at the "basic SPA rate."[3] H.R. Rep. No. 747, 84th Cong., 1st Sess., pp. 5-6 (1955). The report of the conference committee called for delivery at the basic SPA rate "if practical." H.R. Conf. Rep. No. 1085, 84th Cong., 1st Sess., p.4 (1955).

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[2]Contrary to petitioner's assertion (Pet. 18, n. 21), Congress did not express the view that these contracts were "valid and legal." While such a statement was included in the House Report on the 1956 appropriations bill (H.R. Rep. No. 747, 84th Cong., 1st Sess., p. 5 (1955)), the Senate Report expressly stated that "[t]he action of the committee is not to be considered a congressional interpretation of the legality of the contracts involved." S. Rep. No. 700, 84th Cong., 1st Sess., p. 6 (1955). Indeed, in discussing the 1964 appropriations bill, Senator Ellender, one of the conferees on the 1956 appropriations bill, indicated that in his view such an arrangement was illegal without prior congressional approval. 109 Cong. Rec. 23808-23809 (1963).

[3]"Load centers" are locations where power is reduced in voltage (usually below 25 kv) for distribution to ultimate consumers.

In 1962, when it was foreseen that SPA could no longer fulfill the power requirements of the cooperatives, the contracts were superseded by a new contract between SPA and petitioner, a master cooperative that had been formed by six Missouri generation and transmission cooperatives to consolidate their power operations and build new generation and transmission facilities (Pet. App. 6a).[4] The new contract provided that SPA would sell petitioner hydroelectric power at a specified rate, which could, however, be increased or decreased by SPA subject to approval by the Federal Power Commission.[5] If petitioner did not desire to purchase power at an increased rate, it could terminate the agreement. Provisions in earlier contracts for load-center delivery were dropped. The new contract also provided that, in return for transmitting power on behalf of SPA and for other purported services, SPA would give petitioner annual credits against the cost of the power it purchased.[6] The credits included SPA's payment to petitioner of the cost of transmitting power to petitioner over petitioner's facilities.[7]

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[4]The new contract merely suspended the prior contracts between SPA and the cooperatives; if the new contract is terminated prior to July 1, 1995, the suspended contracts will be revived (Pet. App. 7a, n.7).

[5]The rate schedule provided for a demand charge of $14.40 per kilowatt per year and an energy charge of 2 mills per kilowatt hour (Pet. App. 6a, n.6).

[6]Petitioner also agreed to provide SPA with reserve generation and to maintain and operate certain isolated SPA facilities (Pet. App. 7a). The annual credits were set at $4,140,000. It was agreed that the credits would increase to $4,655,100 after petitioner installed two additional transmission facilities.

[7]Petitioner contends that it uses only 52 percent of the power transmitted over its facilities. The court of appeals has remanded that factual question for determination by the district court (Pet. App. 20a).

In February 1965, the Federal Power Commission noted that "[SPA's] revenues have fallen far short of meeting repayment requirements" and concluded that "a primary cause of [SPA's] financial plight is the substantial payments it makes under its contract with [petitioner]" and another cooperative (33 FPC 217, 222, 224; see also 40 FPC 291, 295). In June 1965, a report of the Comptroller General to Congress stated that the credits in SPA's contract with petitioner, including those for transmission services, were "excessive and inequitable" (No. B-153294, June 18, 1965).

In July 1969, the Administrator of SPA determined that SPA had insufficient revenues to meet its operating expenses and repay the government investment with interest, as required by the Flood Control Act, and that the largest part of the loss of revenue resulted from its contract with petitioner (Pet. App. 8a). Accordingly, the Administrator prepared a revised rate schedule that included a variable charge for transmitting power beyond SPA's high voltage grid. Under the revised schedule, petitioner is required to pay the cost of transmitting the power it purchases—a cost which the SPA previously had absorbed.

The Secretary concurred in the Administrator's recommendation and submitted the revised rate schedule for confirmation and approval to the Federal Power Commission. The Commission thereupon issued a public notice of the submission and invited comments. 35 Fed. Reg. 3091. On March 31, 1970, petitioner petitioned to intervene in the proceedings and requested a full hearing, and in support thereof filed a brief and an engineering report in opposition to the proposed rate schedule (Pet. App. 27a-28a). After giving full consideration to the proposed revision, but without an evidentiary hearing, the Commission

issued an order on May 28, 1970, confirming the rate revision as consistent with the Flood Control Act (Pet. App. 25a-31a). The appropriations committees of each House of Congress were informed of the rate revision (Pet. App. 9a).

In July 1970, SPA's bill to petitioner included the new transmission service charge. Petitioner refused to pay the new charge and, instead, instituted the present action, seeking declaratory and injunctive relief (Pet. App. 9a). The district court granted summary judgment for petitioner on cross-motions for summary judgment (Pet. App. 23a-24a). The court of appeals unanimously reversed and remanded to the district court (Pet. App. 1a-21a).

The court of appeals held that since Section 5 of the Flood Control Act expressly provides that the rates imposed with respect to a sale of power must be adequate to recover the costs of both providing and transmitting the power, imposition of the transmission service charge was within the Secretary's rate-making authority (Pet. App. 14a). The court further held that the Secretary's mandate under the Act to recover the cost of transmission had not been withdrawn by any subsequent congressional appropriations or instructions or by the contract between petitioner and SPA (Pet. App. 13a-15a). Finally, the court held that the rate revision procedures followed by the Secretary and the Commission had not been arbitrary or capricious (Pet. App. 18a-19a). Since the question whether the particular transmission service charge imposed upon petitioner was reasonable involved a factual dispute over the extent to which petitioner transmitted power to other SPA customers on SPA's behalf, that question was remanded for determination by the district court (Pet. App. 21a).

ARGUMENT

The court of appeals correctly sustained the exercise of the Secretary's rate-making authority under the Flood Control Act to recover the costs incurred in transmitting as well as generating hydroelectric power. The questions presented by the petition turn largely on the peculiar nature of the 1962 contract between petitioner and SPA, under which petitioner receives credits which offset the cost of transmitting power, and the effect of specific directions of the House Appropriations Committee concerning the particular transmission lines involved in this case. There is no conflict among the courts of appeals on these issues, and they warrant no further review.

1. Petitioner contends (Pet. 15-18) that the transmission service charge imposed by the Secretary effectively cancels certain of the credits SPA contracted to provide petitioner, and that neither the Act nor the 1962 contract authorizes nullification of such contractual obligations. As the court of appeals recognized, however, the 1962 contract expressly provides that SPA can increase the price at which it sells power to petitioner, subject to approval by the Federal Power Commission. SPA's separate contractual obligation to credit petitioner for providing it with certain services is not affected by the increase in rates.

Indeed, imposition of the transmission service charge was required by the Flood Control Act. Section 5 of the Act directs the Secretary of the Interior to market hydroelectric power generated at certain reservoir projects so as to recover "the cost of producing and transmitting" such power and energy. The transmission service charge in the revised rate schedule implements that policy by recovering the cost of transmitting power. It is well established that a government agency cannot contract in derogation of its statutory powers. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384; *United States* v. *City and County of San Francisco*, 310 U.S. 16, 28; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 394.

Contrary to petitioner's assertion (Pet. 14), there is nothing "inequitable" about requiring petitioner to pay the cost of transmitting the power it purchases. In fact, imposition of the charge simply eliminates an inequitable preference in favor of petitioner. If SPA were to continue to absorb the cost of transmitting over petitioner's lines power that petitioner itself purchases from SPA, petitioner would enjoy a government subsidy received by no other SPA customer. As the Federal Power Commission recognized, the transmission service charge "is an attempt by Interior * * * to make the application of this rate schedule uniform for all customers" (Pet. App. 27a).

2. Petitioner nevertheless contends (Pet. 18-22) that the only permissible means of recovering transmission costs is to increase the basic rate to all customers, rather than to impose a variable transmission charge for transmission beyond the high voltage grid. In support of this contention, petitioner relies primarily upon a report of the House Appropriations Committee on the 1956 appropriations bill, which stated that contracts between SPA and the cooperatives were to provide that "power and energy will be delivered to [their] load centers * * * at the basic SPA rate." H.R. Rep. No. 747, 84th Cong., 1st Sess., p.6 (1955). But as the court of appeals noted (Pet. App. 11a, n. 10), the conference committee's report on the bill called for delivery of power at the basic SPA rate "if practical" (H.R. Conf. Rep. No. 1085, 84th Cong., 1st Sess., p. 4 (1955)), indicating that the conferees were fully mindful of the Secretary's discretion to fix rates under the Flood Control Act. In any event, instructions in committee reports that are not themselves enacted by Congress do not have the force of law. *Rural Electrification Administration* v. *Central Louisiana Electric Company*, 354 F.2d 859, 865 (C.A. 5), certiorari denied, 385 U.S. 815; *In re Evans*, 452 F.2d 1239, 1245 (C.A.D.C.), certiorari denied *sub nom. United States* v. *Evans*, 408 U.S. 930.

Petitioner also relies upon the fact that the Secretary followed the Appropriation Committee's instructions by reactivating the contracts in 1956 to provide for delivery of power to the cooperatives' load centers at the basic SPA rate, and that Congress thereafter continually appropriated funds to meet these contractual obligations. But those appropriations do not reveal a congressional intent that SPA should absorb the cost of transmitting power to the cooperatives. The funds appropriated by Congress were for the purpose of meeting all costs in connection with rentals of transmission facilities, of which SPA's contractual arrangements constituted a small part. Indeed, since 1970 Congress has been advised of the imposition of the transmission service charge, but the record does not indicate that Congress or any of its committees has suggested that the charge is improper.

Unless the Secretary has authority to impose a variable transmission charge for transmission beyond the high voltage grid (and thereby to charge petitioner the cost of transmitting power it purchases), purchasers of power who are located on the high voltage grid, for whom SPA does not incur transmission costs, would perforce subsidize other purchasers, such as petitioner, for whom SPA incurs such costs. Nothing in the Flood Control Act or its subsequent legislative history requires that the Secretary establish such a subsidy policy.[8]

3. Finally, petitioner contends (Pet. 23-25) that the actions of the Secretary in proposing the rate revision, and of the Federal Power Commission in denying petitioner's petition to intervene and request for a hearing, were arbitrary, capricious, and an abuse of discretion.

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[8]Petitioner contends that the transmission service charge discriminates against customers served over non-federal lines, such as petitioner, while giving an advantage to customers who obtain their power directly from SPA's high-voltage grid. As the court of appeals noted, however, "[a] rate distinction between those companies which take their power directly from the high voltage grid of SPA and those which require delivery of power by SPA beyond SPA's high voltage grid is not unreasonable" (Pet. App. 18a).

Petitioner's allegation of a taking of property presumably rests upon the asserted unreasonableness of the charge imposed by the Secretary. But the central factual question bearing upon reasonableness, *i.e.*, the extent, if any, to which petitioner's lines are used for the transmission of power on behalf of other SPA customers, has been remanded for determination by the district court. Accordingly, petitioner's demand for just compensation is premature. Moreover, if petitioner determines after the district court's decision on remand that the costs of obtaining power from SPA will be excessive, petitioner may exercise its right to terminate the 1962 contract.

Petitioner's contention that the Secretary denied petitioner procedural due process by failing to give notice of and offer an opportunity to comment on the proposed rate revision was not raised in the court of appeals and therefore need not be considered by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. That contention is, in any event, without merit.

Petitioner was not statutorily entitled to a hearing before the Secretary, since the Administrative Procedure Act expressly exempts matters relating to agency management of public property from its rule-making procedures. 5 U.S.C. 553(a)(2). See *Bi-Metallic Co.* v. *Colorado*, 239 U.S. 441; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 167 (Frankfurter, J., concurring). Nor was there any denial of procedural due process. Petitioner had ample opportunity to comment upon the proposed rate revision before the Federal Power Comission.[9] The Commission gave notice of the proposed rate revision and invited com-

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[9]Moreover, petitioner will have an opportunity on remand to challenge the reasonableness of the transmission charge. Cf. *Jennings* v. *Mahoney*, 404 U.S. 25, 26.

ments. 35 Fed. Reg. 3091. On March 31, 1970, petitioner filed a petition to intervene, a brief, and an engineering report in opposition to approval of the rate revision. Petitioner filed a supplemental engineering report on April 16, 1970. Petitioner filed additional information on May 26, 1970. The Commission also considered comments from other SPA customers, as well as from petitioner's customers (Pet. App. 28a). The Commission was not required to go further and hold an evidentiary hearing prior to approving the proposed rate revision. *United States* v. *Florida East Coast Railway*, 410 U.S. 224, 245-246; *Joint Anti-Fascist Committee* v. *McGrath, supra*, 341 U.S. at 167.[10]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1975.

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[10]The Federal Power Commission is not required to hold evidentiary hearings on proposed rate revisions, notwithstanding that it has authority to do so and occasionally has done so with regard to unusually complex rate revisions (see, *e.g., Department of the Interior, Bonneville Power Administration*, FPC Docket No. E-8978).